

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE)	
)	
v.)	
)	Cr.A. No. 0709001383
DAMON STIGARS,)	
Defendant)	

Submitted: September 1, 2009
Decided: September 28, 2009

Upon Defendant's Motion to Suppress
DENIED

MEMORANDUM OPINION AND ORDER

Barzilai K. Axelrod, Esquire, Department of Justice, Wilmington, Delaware,
Attorney for the State

Andrew Rosen, Esquire (argued), Brian Rick, Esquire, Office of the Public
Defender, Wilmington, Delaware, Attorneys for the Defendant

ROCANELLI, J.

Defendant Damon L. Stigars was charged by information with Driving After Judgment Prohibited in violation of 21 Del. C. §2810(a), Driving Under the Influence of Alcohol in violation of 21 Del. C. §4177(a), and Driving While Suspended or Revoked in violation of 21 Del. C. §2756(a). Defendant filed a Motion to Suppress pursuant to Court of Common Pleas Criminal Rule 41 on the grounds the field tests should be suppressed because they were not properly administered, and contending

there was no probable cause for the arrest. At a suppression hearing on September 1, 2009 the State presented evidence, including testimony by Corporal Leonard Aguilar of the Delaware State Police. The Court concludes the Horizontal Gaze Nystagmus (“HGN”) test was properly administered; the Portable Breath Test (“PBT”) may be considered as one element to establish probable cause; and there was probable cause for Defendant’s arrest. Therefore, Defendant’s Motion to Suppress is denied.

THE FACTS

On September 2, 2007, Corporal Aguilar was on routine patrol in a fully marked patrol car travelling northbound on Route One in New Castle County when he observed Defendant’s vehicle pull off the road onto the shoulder at approximately 3:50 a.m. Consistent with the community caretaker doctrine, Corporal Aguilar pulled off the road behind Defendant’s vehicle¹ and observed Defendant exit his vehicle from the driver’s side and

¹ Although Defendant challenged the stop in the Motion to Suppress filed with the Court on May 28, 2009, at the hearing on September 1, Defendant conceded it was proper for Corporal Aguilar to make an inquiry of the Defendant as to whether assistance was needed, consistent with the community caretaker doctrine. *Guererri v. State*, 922 A.2d 403, 407 (Del. 2007) (discussing a police officer’s community caretaking function as a primary concern for health and safety rather than pursuing a law enforcement function).

walk onto the grass beyond the paved shoulder. Corporal Aguilar observed Defendant prepare to urinate onto the grass.

In the meantime, Corporal Aguilar observed the female passenger exit Defendant's vehicle from the front passenger seat and get into the driver's seat. In response to the trooper's inquiry, the female who was formerly the passenger informed Corporal Aguilar she had been sleeping when Defendant awakened her and told her she had to drive. She told Corporal Aguilar she and Defendant were returning from Philadelphia.

While Corporal Aguilar was speaking to the female who was formerly the passenger, he observed Defendant walk further away onto the grass from the paved shoulder, and Corporal Aguilar made contact with Defendant. From a distance of arm's length, Corporal Aguilar observed Defendant had watery, bloodshot eyes and also detected a moderate odor of alcohol. At this time, Corporal Aguilar turned on the audio-video recording equipment in his patrol car ("MVR").² Corporal Aguilar asked Defendant to perform a series of field sobriety tests, to which Defendant consented.

First, after ascertaining the level of Defendant's education, Corporal Aguilar asked Defendant to perform a version of the so-called "alphabet

² Without objection from Defendant, the State played the MVR at the suppression hearing.

test.” According to Corporal Aguilar, Defendant did not follow the instructions for reciting the alphabet from the letter D to the letter O.

Next Corporal Aguilar administered the HGN test. It was established Corporal Aguilar was trained to administer HGN tests.³ The HGN test was administered to Defendant in compliance with National Highway Traffic Safety Administration (“NHSTA”) standards. Defendant was either unwilling or unable to keep his head still. According to Corporal Aguilar, to the extent Defendant was able to perform the HGN test, Defendant failed six of the six possible clues.

Defendant challenged the administration of the HGN test on the grounds the flashing lights from the patrol car as well as the positioning of Corporal Aguilar’s flashlight interfered with Defendant’s vision and rendered the results unreliable. The Court credits Corporal Aguilar’s opinion, based on his training and experience,⁴ that the HGN test was properly administered to Defendant resulting in a valid and reliable failure.

Corporal Aguilar next administered a PBT, which Defendant failed. Corporal Aguilar placed Defendant under arrest for Driving Under the

³ HGN training was part of Corporal Aguilar’s training at the Delaware State Police Academy. State's Exhibit One is the September 20, 1999 certificate Corporal Aguilar received from the Delaware State Police Academy upon his successful completion of NHTSA DUI Detection and HGN course.

⁴ Corporal Aguilar testified he has made 100-150 DUI arrests in his ten (10) years as a State trooper.

Influence of Alcohol in violation of 21 Del. C. §4177(a), as well as other related charges.

FIELD TESTS AND PROBABLE CAUSE

The “alphabet test” is not recognized as a sufficiently reliable indicator of alcohol impairment by NHSTA. However, an officer such as Corporal Aguilar may use performance on the “alphabet test” to determine whether probable cause exists to arrest an intoxicated person.⁵ Therefore, Defendant’s failure to follow Corporal Aguilar’s instructions to recite the alphabet from the letter D to the letter O is one element that established probable cause.

Defendant challenged administration of the HGN test by Corporal Aguilar but did not cite any case law to support Defendant’s position that the flashing lights from the patrol car as well as the positioning of Corporal Aguilar’s flashlight interfered with Defendant’s vision and therefore rendered the test unreliable. With a proper foundation, the HGN test is a reliable indicator of impairment that may be used to assess probable cause.⁶ According to NHSTA’s on-line Resource Guide for Horizontal Gaze Nystagmus:

⁵ *State v. Ministerio*, 2006 WL 3844201 (Del. Super.).

⁶ *State v. Ruthardt*, 680 A. 2d 349, 354, 362 (Del. Super. 1996).

The HGN test is very easy to administer. The officer must administer the test in a way that ensures that the subject's eyes can be seen clearly, i.e., in a well lit area or by use of a flashlight to illuminate the subject's face. The subject should not face toward the blinking lights of a police cruiser or passing cars, which may cause optokinetic nystagmus.

HORIZONTAL GAZE NYSTAGMUS: THE SCIENCE & THE LAW, A Resource Guide For Judges, Prosecutors And Law Enforcement, Administering the HGN Test, <http://www.nhtsa.dot.gov/people/injury/enforce/nystagmus/hgntxt.html>.

Corporal Aguilar testified he administered the HGN test according to standard operating procedure, facing Defendant away from the patrol car's flashing lights and with the Defendant's back to passing traffic. In addition, Corporal Aguilar testified he used his flashlight to illuminate Defendant's eyes but did not shine the flashlight directly into Defendant's eyes. The Court is satisfied the proper foundation was laid establishing Corporal Aguilar's experience and training to administer the HGN test and that Corporal Aguilar properly administered the HGN test.

Defendant challenged Corporal Aguilar's administration of the PBT on the grounds that a twenty-minute waiting period was not observed. It is well established that failure on a PBT may be considered in a determination

of whether there is probable cause for an arrest.⁷ Since the failed PBT was just one of several elements upon which Corporal Aguilar concluded there was probable cause to arrest Defendant, it is not necessary to reach the question of whether a twenty-minute waiting period must be observed. Indeed, there was probable cause under the circumstances presented even without a failure by Defendant on the PBT.⁸

Defendant moved to suppress the arrest on the basis that Corporal Aguilar did not have probable cause to take Defendant into custody. “To establish probable cause, the police are only required to present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability that the defendant has committed a crime.”⁹ In cases in which a defendant is suspected of and charged with Driving Under the Influence of Alcohol, evidence must be presented that, under the totality of the circumstances, there is a fair probability the defendant was driving a vehicle while under the influence of alcohol.¹⁰ Based on the uncontroverted testimony Defendant pulled over to the side of the road in the middle of the

⁷ *Attix v. Voshell*, 579 A. 2d 1125 (1989), *aff’d*, Del. Supr., No. 435, 1989, Walsh, J. (March 21, 1990).

⁸ *See State v. Betts*, 2009 WL 388952 (Del. Super. 2009) (where probable cause was found based on numerous factors despite the defendant’s having “passed” the PBT).

⁹ *State v. Maxwell*, 624 A.2d 926, 930 (Del. 1993).

¹⁰ *Id.*; 21 Del. C. § 4177(a)(1), (4).

night to urinate; he admitted he had been drinking; he had watery, bloodshot eyes; there was an odor of alcohol; he did not recite the alphabet according to the instructions; and he failed the HGN test and PBT, Corporal Aguilar had probable cause to arrest Defendant for DUI and to take Defendant into custody.¹¹

CONCLUSION

For these reasons, the Court rules the HGN test was properly administered by Corporal Aguilar; the failed PBT may be considered to establish probable cause; and Corporal Aguilar had probable cause to arrest Defendant. Therefore, Defendant's Motion to Suppress is hereby **DENIED**.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli

¹¹ *Bease v. State*, 884 A.2d 495, 500 (Del. 2005) (holding probable cause can be established by the police officer's observations and the rational inferences drawn therefrom).